YBLE RESOURCES SDN BHD A

v.

VESTIME CORPORATION SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING B
DAVID WONG DAK WAH JC
[SUIT NO. 22-27-2005-III (I)]
29 MARCH 2006

CIVIL PROCEDURE: *Striking out - Application for - Issues raised - Whether defendant prevented from raising objections - Rules of the High Court 1980, O. 6 r. 7 & O. 15 r. 8 - Folin & Brothers Sdn Bhd v. Wong Foh Ling & Ors* C

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Grounds for - Validity period of writ - Whether expired - Whether no amendments could be made to a writ to enjoin new parties - Rules of the High Court 1980, O. 6 r. 7 & O. 15 r. 8 - Folin & Brothers Sdn Bhd v. Wong Foh Ling & Ors* D

There were two formal applications. The plaintiff in encl. 52 was seeking, pursuant to O. 15 r. 6(2)(b) and/or O. 20 r. 5 Rules of the High Court 1980, to add more parties to the suit. The defendant, instead of filing an affidavit in opposition took out encl. 56 which was an application to strike out encl. 52. This court decided to hear encl. 56 first. It was the defendant's submission that (i) there was no prayer for extension of the validity period of the writ which had expired on 9 September 2005; (ii) the SIC was filed outside the validity period of the writ and all steps taken outside the validity period of the writ were nullities; (iii) no amendments could be made to a writ to enjoin other new parties where the writ had expired because the writ was no longer valid without being renewed; (iv) the plaintiff sought to amend the writ that had expired and hoped to serve the writ on the proposed new parties in March 2006 well after the writ had expired and (v) there was no explanation of the delay on the part of the plaintiffs. E F G H

Held (dismissing encl. 56):

(1) The validity period endorsed in the writ of summons and the statement of claim was related only to the service of the same. Once that writ of summons and the statement of claim have been served within the six months or extended period, they become complete so to speak as far as the cause of action I

was concerned. Should the plaintiff intend to add further defendants, the relevant periods were the periods prescribed in the statute of limitation for that particular cause of action. (para 8)

(2) The amendment does not relate back to the date when the original writ and statement of claim were filed *(Folin & Brothers Sdn Bhd v. Wong Foh Ling & Ors)*. The relevant date to determine whether the cause of action infringes the limitation periods is the date upon which the amendment to add a new party is granted. (para 8)

(3) The law does not require encl. 52 to be served by the plaintiff on the proposed second, third and fourth defendants for the simple reason that the plaintiff was entitled to sue whomever it so wished. Whether or not it has a cause of action against the proposed defendants must be left to the proposed defendants to strike out or defend when served with the amended writ of summons and statement of claim. (para 9)

(4) There was no affidavit to show how the addition of the proposed defendants affected the defendant. This lack of standing on the part of the defendant in this application should prevent them from raising any objection. (para 3)

[Enclosure 52 to be heard on its merits.]

Case(s) referred to:

Arab Malaysian Credit Berhad v. Tan Seang Meng [1995] 1 CLJ 773 CA ***(refd)***

Datuk Bandar Kuching Utara v. Kuching Plaza Sdn Bhd [2001] 2 MLJ 10 ***(refd)***

Folin & Brothers Sdn. Bhd. v. Wong Foh Ling & Wong Swee Lin & Ors [2001] 1 CLJ 604 HC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 6 r. 7, O. 15 rr. 6(2)(b), 8, O. 20 r. 5

For the plaintiff - Satinder Singh Sandhu; M/s Sandhu & Co

For the defendant - Shanker Ram (Francis Teron with him); M/s Thomas, Shankar Ram & Co

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah JC:

[1] Before me are two formal applications. The plaintiff in encl. 52 is seeking the following orders pursuant to O. 15 r. 6(2)(b) and/or O. 20 r. 5, RHC 1980:

(1) that Pati Usaha Sdn. Bhd. be added as the second defendant in this action;

(2) that Bank Pembangunan Malaysia Berhad be added as the third defendant in this action;

(3) that Awgku Mohd Salleh bin Pgn. Syed Shahminan be added as the fourth defendant in this action;

(4) that the plaintiff be at liberty to re-amend the writ and the statement of claim in the manner indicated in the proposed re-amended writ and the proposed re-amended statement of claim annexed thereto as "A" and "B"; and

(5) consequential orders under prayers 5 to 9.

[2] The defendant instead of filing an affidavit in opposition took out encl. 56 which is an application to strike out encl. 52. That being the case, I decided to hear encl. 56 first despite the fact that encl. 52 was filed before encl. 56.

[3] Enclosure 56 is taken out by the defendant, which raises the question whether or not they have the *locus standi* to do so. Enclosure 52 is actually an application by the plaintiff to add more parties to this suit which they are legally entitled to do so. There is no affidavit before me to show how the addition of the proposed defendants affects the defendant. In my view this lack of standing on the part of defendant in this application prevents them from raising any objection. On this ground alone encl. 56 can be dismissed.

[4] Be that as it may, since both counsels had submitted in some length, I deem it desirable to deal with their contentions. What then are the grounds of encl. 56 for striking out encl. 52? Counsel for the defendant, Mr. Shankar Ram's contention appears to be a logical and reasonable one. This is how he puts it and I quote from his submission:

A The Writ was filed on 9/3/2005 and expired on 9/9/2005. It is submitted that the Plaintiff's SIC dated 7/11/2005 is bad in law for the following reasons:

(a) There is no prayer for extension of the validity period of the Writ which expired on 9/9/2005 – There should be a Prayer to extend the validity period of the writ from 9/9/2005 to 9/3/2006, otherwise the writ remain invalid;

(b) The SIC was filed outside the validity period of the writ and all steps taken outside the validity period of the writ (without seeking to renew the writ) are nullities;

(c) No amendments could be made to a writ to enjoin other new parties where the writ had expired because the writ was no longer valid without being renewed;

(d) By their SIC dated 7/11/2005, the Plaintiffs seeks to amend the writ that had expired on 9/9/2005 and hopes to serve the writ on the proposed new parties in about March 2006, well after the writ had expired and all steps taken and contemplated to be taken are void without the writ itself being renewed;

(e) There is no explanation of the delay on the part of the Plaintiffs at all.

[5] Mr. Shanker Ram also submitted that the plaintiff's writ of summons was bad as it contained an endorsement that it has a period of 12 months rather than six months. In my view that is a non consequential mistake as the writ and statement of claim was served on the defendant prior to the expiry of the six months period.

[6] I come back to Mr. Shanker Ram's main submission. This involves an analysis of O. 15 r. 8 of the Rules of the High Court (RHC) and of O. 6 r. 7 of the RHC which respectively provide:

Rule 8. Provisions consequential on making of order under rule 6 or 7 (O. 15 r. 8)

(1) Where an order is made under rule 6 the writ by which the action in question was begun must be amended accordingly and must be indorsed with:

(a) a reference to the order in pursuance of which the amendment is made; and

(b) the date on which the amendment is made;

and the amendment must be made within such period as may be specified in the order or, if no period is so specified, within 14 days after the making of the order.

(2) Where by an order under rule 6 a person is to be made a defendant, the rules as to service of a writ of summons shall apply accordingly to service of the amended writ on him, before serving the writ on him the person on whose application the order was made must procure the order to be noted in the cause book.

(3) Where by an order under rule 6 or 7 a person is to be made a defendant, the rules as to entry of appearance shall apply accordingly to entry of appearance by him, subject, in the case of a person to be made a defendant by an order rule 7, to the modification that the time limited for appearing shall begin with the date on which the order is served on him under rule 7(4) or, if the order is not required to be served on him, with the date on which the order is noted in the cause book. The entry of appearance must be in Form 21.

(4) Where by an order under rule 6 or 7 a person is to be added as a party or is to be made a party in substitution for some other party, that person shall not become a party until:

(a) where the order is made under rule 6, the writ has been amended in relation to him under this rule and (if he is a defendant) has been served on him; or

(b) where the order is made under rule 7, the order has been served on him under rule 7(4) or, if the order is not required to be served on him, the order has been noted in the cause book;

and where by virtue of the foregoing provision a person becomes a party in substitution for some other party, all things done in the course of the proceedings before the making of the order shall have effect in relation to the new party as they had in relation to the old, except that entry of appearance by the old party shall not dispense with entry of appearance by the new in Form 21.

(5) The foregoing provisions of this rule shall apply in relation to an action begun by originating summons as they apply in relation to an action begun by writ.

Rule 7. Duration and renewal of writ. (O. 6 r. 7)

(1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for 6 months, beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

(2) Subject to paragraph (2a), where efforts to serve a writ on a defendant have been unsuccessful, the Court may by order extend the validity of the writ twice (in Sabah and Sarawak thrice and in admiralty actions 5 times), not exceeding 6 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.

(2A) An application for renewal must be made before the expiry of the writ, *ex parte* by summons, supported by affidavit showing that efforts have been made to serve the defendant within one month of the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

(3) Before a writ, the validity of which has been extended under this rule, is served, it must be marked with an official stamp in Form 5 showing the period for which the validity of the writ has been so extended.

(4) Where the validity of a writ is extended by order made under this rule, the order shall operate in relation to any other writ (whether original or concurrent) issued in the same action which has not been served so as to extend the validity of that other writ until the expiration of the period specified in the order.

(5) A note of the renewal must be entered in the cause book.

[7] The same argument was canvassed in the case of *Folin & Brothers Sdn. Bhd. v. Wong Foh Ling & Wong Swee Lin & Ors* [2001] 1 CLJ 604. In that case, the original writ and the statement of claim were filed on 14 January 1990 which expired on 13 January 1991. Service on the original defendants had been effected prior to the expiration date. The amended writ of summons and the statement of claim were filed on 16 August 1999 and served on the new 12th defendant. It was then argued by the 12th defendant that the amendment and service were bad as the original writ and the statement of claim had expired already. Abdul Malik Ishak J rejected the argument and in doing so said:

With respect, these arguments can easily be classified and categorized as erroneous. Order 15 r. 8 of the RHC is a specific provision governing the addition of the twelfth defendant, whereas O. 6 r. 7 of the RHC is a general provision relating to practice and it envisages the situation where the writ has failed to be served on the original defendants named therein within the initial 12 months period from the date of issue. In my judgment, the specific provision must necessarily take precedent over the general provision. I am fortified in my view by certain passages that appeared in the judgments of other learned judges in the following cases:

(1) In *Barker v. Edger & Ors* [1898] AC 748 PO at p 754, Lord Hobhouse had this to say:

> The general maxim is, *Generalia specialibus non derogant*. When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and on its own terms. This case is a peculiarly strong one for the application of the general maxim …

[8] I find the reasoning of the learned judge both sound and reasonable. However I wish to add that the validity period endorsed in the writ of summons and the statement of claim relates only to the service of the same. Once that writ of summons and the statement of claim are served within the six months or extended period, they become complete so to speak as far as the cause of action is concerned. Should the plaintiff intend to add further defendants, the relevant periods are the periods prescribed in the statute of limitation for that particular cause of action. As pointed out by the learned judge in *Folin & Brothers Sdn. Bhd. v. Wong Foh Ling & Wong Swee Lin & Ors (supra)*, the amendment does not relate back to the date when the original writ and statement of claim were filed. The relevant date to determine whether the cause of action infringes the limitation periods is the date upon which the amendment to add a new party is granted. This is the application of the 'No Useful Purpose Theory' as discussed in *Folin & Brothers Sdn. Bhd. v. Wong Foh Ling & Wong Swee Lin & Ors (supra)*. Once the amendment is granted by the court, the plaintiff then has six months to serve the amended writ and statement of claim.

[9] Mr. Shanker Ram also submitted that the rule of natural justice requires encl. 52 to be served by the plaintiff on the proposed 2nd, 3rd and 4th defendants. With respect the law does not require it for the simple reason that the plaintiff is entitled to sue whomever it so wishes. Whether or not it has a cause of action against the proposed defendants must be left to the proposed defendants to strike out or defend when served with the amended writ of summons and statement of claim. Ian HC Chin J in *Datuk Bandar Kuching Utara v. Kuching Plaza Sdn Bhd* [2001] 2 MLJ 10 at p. 15 held that such an argument to be obviously untenable. He said:

> To uphold the contention would render the court's discretion conferred by O. 15 r. 12 of the RHC completely incapable of exercise, since it would be dependent entirely on the whims of the parties concerned. The rules also do not impose such a requirement. There is therefore no merit in this argument.

[10] Though there is no need to deal with Mr. Shanker Ram's contention that any application to renew or extend the period of the writ of summons and statement of claim must be filed prior to the expiry of the same, I find it proper to do so as he had referred to several cases. It appears those cases are contrary to the case of *Arab Malaysian Credit Berhad v. Tan Seang Meng* [1995] 1 CLJ 773 where Gopal Sri Ram JCA states as follows:

> The scope, operation and effect of O. 6 r. 7 has been considered in a number of cases. No advantage will be gained by going through all of them here. There is a need, however, to deal with some of them to see how the Courts in England have interpreted their O. 6 r. 8 which, until its revision in June 1990, was *ippissima verbis* our O. 6 r. 7. That is by no means to say that we will slavishly follow the English practice on the administration of the rule, or indeed any rule: for in the end, it is for us to decide what our law or practice on the subject ought to be, and if this is similar to that obtaining in England, then it is a matter of coincidence that we think alike.
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> On the English practice, we do not think it necessary to commence before the decision of the House of Lords in *Kleinwort Benson Ltd. v. Barbrak Ltd.* [1987] AC 597, which is also reported in [1987] 2 All ER 289. It is to the latter report that we shall make reference, since it was from that report that Encik Anantham read passages to us during argument. Lord Brandon explained the English position in the following way (at p. 294):

Four main differences are to be observed in the new rule, O. 6 r. 8, by comparison with the previous rule, O. 8 r. 1. First, there is the change of terminology from renewal of a writ to extension of its validity. Second, there are no longer any express terms making it a condition of allowing the extension of the validity of a writ that the Court should be satisfied that reasonable efforts have been made to serve a defendant who has not been served, or that there is some other good reason for such allowance. Third, there are no longer any express terms concerning the effect of extension in preventing the operation of a statute of limitation. Fourth, there is an express provision permitting a plaintiff to apply for an extension not only before the validity of a writ has expired, but also after such expiry, if and to the extent that the Court allows. This makes it unnecessary for a plaintiff seeking an extension of the validity of a writ after it has expired to rely on any other rule for that purpose.

Now, we unhesitatingly accept the caveat administered to us by Encik Nathan in his submission that the remarks made by Lord Brandon in the speech we have reproduced are mere *obiter dicta*. But that caveat does not denude the passage cited of its content because the observation of Lord Brandon do nothing more than to highlight the salient aspects of the rule which are plainly visible to one's intellect upon a reading of it and upon a comparison of it with its precursor. What comes through when a reading of the speech as a whole is undertaken is that a Court has undoubted jurisdiction to extend a writ even after its expiry. Whether that jurisdiction ought to be invoked in a given case is a matter within the discretion of the Court hearing an application to extend: *Waddon v. Whitecroft Scovell Ltd.* [1988] 1 WLR 309.

[11] Based on the aforesaid case, I therefore hold that this contention also fails.

[12] For the foregoing reasons, I dismiss encl. 56 with costs to the plaintiff to be taxed unless agreed. I shall now deal with encl. 52 on its merits.